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IN THE
COURT OF APPEALS OF INDIANA

CHRISTOPHER KIMBRELL,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A02-0608-CR-711
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Robert Altice, Judge
Cause No. 49G02-0406-FA-105656

June 20, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

KIRSCH, Judge

Following a jury trial, Christopher Kimbrell was convicted of two counts of Class A felony child molesting[1] and one count of Class C felony child molesting.[2] He was sentenced to twenty-five years executed for each of the Class A felonies, to be served consecutively, and four years executed for the Class C felony to be served concurrently with his fifty-year sentence. On appeal, he raises the following restated issues:

I. Whether the trial court erred in admitting portions of Kimbrell's videotaped statement to police.

II. Whether the trial court erred in imposing Kimbrell's sentence.

We affirm.

FACTS AND PROCEDURAL HISTORY

The facts most favorable to the convictions reveal that Kimbrell is the father of H.K., who was born in Indianapolis in October 1993. Kimbrell and H.K.'s mother were married but divorced in 1997.

In November 2001, H.K., who was then eight years old, was visiting Kimbrell in his Indianapolis house. During the visit, H.K. entered the bathroom while her father was showering. Kimbrell asked his daughter if she had any questions about why boys are different than girls. H.K. merely answered "yes" and left the bathroom. *Tr*. at 132. After his shower, Kimbrell found H.K. in the living room watching a movie. He told her that he could not teach her how boys and girls are different but would have to show her. Kimbrell led H.K. into his bedroom, told her to remove her clothes, took his towel off, and touched H.K.'s

[1] *See* IC 35-42-4-3(a).

[2] *See* IC 35-42-4-3(b).

"private parts" with his "private part." *Id*. at 134-35. Kimbrell told H.K. not to tell anyone because if she did, he "would probably go to jail." *Id*. at 136.

When she was ten years old, H.K. visited her father and his family at another Indianapolis house. One evening while H.K. was changing into her pajamas, Kimbrell entered the room, picked H.K. up while she was naked, and placed her on the bed. Kimbrell then started touching her with his finger "inside [her] butt." *Id*. at 140. Again, Kimbrell told her not to tell anyone or he would go to jail.

Later, while H.K. was still ten years old, Kimbrell touched his daughter on the inside of her "private part" with his "private part," and H.K. testified, "[i]t went in a little bit." *Id*. at 145. Kimbrell also used his "private part" to touch her "chest" and "butt." *Id*. H.K. told her father to stop and he complied.

In June 2004, upon hearing from a friend that she had been molested, H.K. told the friend that she too had been molested. The friend told her mother, who in turn told H.K.'s mother. Kimbrell was arrested and charged with two counts of Class A felony child molesting and two counts of Class C felony child molesting.

As part of the investigation, Detective Greg Norris took a videotaped statement from H.K. on June 10, 2004 and one from Kimbrell on June 11, 2004. Prior to trial, the court held a child hearsay hearing pursuant to IC 35-37-4-6 to determine the admissibility of H.K.'s statement. The trial court found the time, content, and circumstances of the statement did not provide sufficient indications of reliability and held the statement inadmissible at trial.

Kimbrell was tried in August 2005, the jurors reached an impasse, and the trial court declared a mistrial.

Prior to his second trial, Kimbrell moved for an order in limine to prevent the introduction into evidence of certain portions of his videotaped statement. The trial court denied Kimbrell's motion and, after his June 2006 retrial, the jury returned guilty verdicts on all four counts. Following a sentencing hearing, the trial court sentenced him to twenty-five years for each of his Class A felony convictions for child molesting, and ordered the sentences to run consecutively. The trial court also sentenced Kimbrell to four years on his Class C felony conviction to run concurrently with the other counts. The trial court did not enter judgment on the remaining Class C felony conviction on the basis that it merged into one of the Class A felony convictions. Kimbrell now appeals.

DISCUSSION AND DECISION

I. Erroneously Admitted Evidence

Kimbrell first contends that the trial court erred in admitting portions of the statement he made to Detective Norris during the investigation. The admissibility of evidence is within the sound discretion of the trial court, and the decision whether to admit evidence will not be reversed absent a showing of manifest abuse of the trial court's discretion resulting in the denial of a fair trial. *Bailey v. State*, 806 N.E.2d 329, 331 (Ind. Ct. App. 2004), *trans. denied*. The improper admission of evidence is harmless error if the conviction is supported by substantial independent evidence of guilt satisfying the reviewing court that there is no substantial likelihood the challenged evidence contributed to the conviction. *Winbush v. State*, 776 N.E.2d 1219, 1221 (Ind. Ct. App. 2002), *trans. denied* (2003). The erroneous

admission of evidence that is merely cumulative of other evidence in the record is not reversible error. *Blanchard v. State*, 802 N.E.2d 14, 30 (Ind. Ct. App. 2004).

The evidence to which Kimbrell objects is his statement to Detective Norris in which he denied having molested H.K. and questioned why she would have made such an allegation. Upon further questioning, however, Kimbrell related an incident to suggest why H.K. may have made such allegations. The incident described was one where Kimbrell awoke and, thinking that his wife was next to him in bed, put his arm around H.K. He admitted that he had an erection at the time, but denied that his penis ever touched H.K. Kimbrell alleges that the admission of the description of this "uncharged misconduct" over his continuing objection was improper under Indiana Evidence Rule 404(b). *Appellant's Br.* at 8.

Rule 404(b) provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pre-trial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.

The rationale underlying Rule 404(b) is that the jury is precluded from making the forbidden inference that the defendant had a criminal propensity and therefore engaged in the charged conduct. *Holden v. State*, 815 N.E.2d 1049, 1054 (Ind. Ct. App. 2004), *trans. denied*.

The State's use of this evidence did not run afoul of Rule 404(b). Here the action described was not one of child molesting and, thus, could not have been introduced to prove

that Kimbrell acted in conformity therewith. Instead, the State argues that the evidence was introduced to cast doubt on Kimbrell's credibility and his lack of memory relating to a possible motivation for his daughter's allegations.

In its closing argument, the State noted the inconsistency between Kimbrell's initial denial that anything happened between he and H.K. and his later acknowledgment that something came close to happening when H.K. slept in his bed one night. The State asserted that H.K. knew the difference between the truth and a lie and knew the consequences of a lie. The State then concluded, "if you believe [H.K.] and you find her to be credible and you have every reason to in [sic] the world to believe her, then the defendant is guilty." *Tr*. at 326. We agree that the evidence was properly admissible as relevant to the credibility of Kimbrell's version of the events. Moreover, we cannot say that the relevancy of this evidence was substantially outweighed by the danger of unfair prejudice. Ind. Evidence Rule 403. If anything, Kimbrell's version of the events could have provided jurors with a rationale for concluding that H.K. had fabricated the child molesting charges from this unfortunate, albeit innocent, event.

Notwithstanding our finding of no error, had the evidence in fact been improperly admitted, the error would have been harmless. Even the improper admission of evidence is harmless error if the conviction is supported by substantial independent evidence of guilt satisfying the reviewing court that there is no substantial likelihood that the challenged evidence contributed to the conviction. *Winbush*, 776 N.E.2d at 1221. Here, H.K. testified in great detail about the incidents that led to her allegations against Kimbrell. She included the places, times, and details surrounding the acts of molestation. A victim's testimony, even

if uncorroborated, is ordinarily sufficient to sustain a conviction for child molesting. *Bowles v. State*, 737 N.E.2d 1150, 1152 (Ind. 2000); *Greenboam v. State*, 766 N.E.2d 1247, 1257 (Ind. Ct. App. 2002), *trans. denied*. Kimbrell's conviction is supported by substantial independent evidence of guilt. We are satisfied that there is no substantial likelihood that the challenged evidence contributed to the conviction.

II. Sentencing

Kimbrell also claims that the trial court abused its discretion when it imposed consecutive sentences. Sentencing decisions are generally within the discretion of the trial court and will only be reversed upon a showing of an abuse of discretion. *Garland v. State*, 855 N.E.2d 703, 706 (Ind. Ct. App. 2006), *trans. denied*. An abuse of discretion occurs if the trial court's decision is clearly against the logic and effect of the facts and circumstances before it or if the trial court has misinterpreted the law. *Id*. at 706-07.

Citing *Plummer v. State*, 851 N.E.2d 387 (Ind. Ct. App. 2006), Kimbrell contends:

> "'[T]o impose consecutive sentences, a trial court must find at least one aggravating circumstance.'" *Cuyler v. State*, 798 N.E.2d 243, 246 (Ind. Ct. App. 2003) (quoting *Ortiz v. State*, 766 N.E.2d 370, 377 (Ind. 2002)), *trans. denied*. Moreover, if a trial court imposes consecutive sentences when not required to do so by statute, the trial court must explain its reasons for selecting the sentence imposed, including: (1) the identification of all significant aggravating and mitigating circumstances; (2) the specific facts and reasons that lead the court to find the existence of each such circumstance; and (3) an articulation demonstrating that the mitigating and aggravating circumstances have been evaluated and balanced in determining the sentence. *Id*. (citing *Ortiz*, 766 N.E.2d at 377).

851 N.E.2d at 390. Specifically, he argues that the trial court failed to articulate its reasons for imposing the consecutive sentence and, as such, abused its discretion.

During the sentencing hearing, the State focused on Kimbrell's refusal to accept

responsibility for his actions and his tendency to put blame on "everyone but himself." *Tr*. at 381. The State further noted that Kimbrell has a criminal history, that he was in a position of trust with H.K., and that he has another child whose protection should be a consideration. *Id*. The latter two facts were set forth in Kimbrell's pre-sentence report, the accuracy of which Kimbrell acknowledged. *Tr*. at 360.

The defense noted Kimbrell's continued assertion of innocence and, while acknowledging his criminal history, commented that some of the offenses resulted in charges being dismissed and that others pertained to H.K.'s maternal family. *Id*. at 383. The defense agreed that the criminal history could not be discounted, but asked that the history be put in perspective—Kimbrell did not have a substance abuse problem, had more than a high school education, and was not the typical offender that the court would usually have before it. *Id*. at 384.

During the sentencing hearing, the trial court commented,

> quite honestly when I came out here today, I was going to do thirty and thirty consecutive and I think [i]n light of the way I'm going to find aggravators and mitigators, I think what [the State] asked for is much more in line with what I think a higher court would think is an appropriate sentence in this case.

Id. at 386. The trial court then noted Kimbrell's criminal history as follows, "a '91 invasion of privacy; a '91 invasion—domestic battery and criminal confinement which I'm assuming was a D felony; and a '97 B misdemeanor battery." *Tr*. at 386. While recognizing that the criminal history was aggravating, the trial court also noted, "certainly not the most aggravating that I see in my Court." *Id*. The trial court also found as mitigating the fact that

imprisonment would impose a hardship on his dependents, primarily his mother and his current wife and daughter. *Id*.

After weighing these considerations the trial court concluded that consecutive sentences were warranted because the criminal history outweighed any mitigating factors. The trial court then noted, "on Count One and Count Two, I'm both going to give below the advisory sentence because I do want to stack these, because these are two separate incidents in this case." *Id*. at 387. We find the trial court's analysis of Kimbrell's sentence is very compelling. The trial court found that Kimbrell's aggravators outweighed his mitigators. We find no abuse of discretion in this sentence.

By affirming the trial court's order that Kimbrell's sentences run consecutively, we acknowledge that Kimbrell's subsequent crimes against H.K. were as serious as his initial crime against her. Kimbrell clearly deserves serious punishment for the crimes he has committed. A child has been violated—his child—and she and her family have experienced a loss of faith and trust that may never be recovered.

As part of his sentencing argument, Kimbrell also questions whether, under Indiana Appellate Rule 7(B), his sentence is appropriate in light of the nature of the offense and his character. The sentencing range for a Class A felony is twenty to fifty years. Here, the trial court sentenced Kimbrell to twenty-five years for each of his two Class A felony convictions and ordered that they run consecutively, for a total sentence of fifty years. Viewing the nature of the offense, we note that, although Kimbrell's actions were not those of the worst child molester, he repeatedly molested his own daughter over a period of two years and repeatedly told her not to tell anyone or he would go to jail.

Kimbrell's character is woefully short of exemplary. Although he is not addicted to drugs or alcohol, has more than a high school education, and regularly had gainful employment, his criminal history reveals four previous convictions; three Class B misdemeanors and a Class D felony. Kimbrell's convictions for child molesting, battery, particularly domestic battery, and his treatment of his family and in-laws reveal Kimbrell's propensity for abusive treatment of persons in his life, especially those who are vulnerable. We conclude that Kimbrell's fifty-year sentence is not inappropriate in light of the nature of the offense and his character.

Affirmed.

DARDEN, J., and MATHIAS, J., concur.